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In The
# Supreme Court of the United States

FIDELITY EXPLORATION & PRODUCTION COMPANY,

*Petitioner,*

v.

NORTHERN PLAINS RESOURCE COUNCIL INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Clean Water Act requires a National Pollutant Discharge Elimination System permit only for a discharge – i.e., for an "addition" – of a "pollutant" from a point source to waters of the United States. The question presented in this case is whether the pumping and release of natural, unaltered groundwater into a river is an "addition" of a "pollutant" requiring an NPDES permit under the Clean Water Act.

This issue is of great national importance. The Supreme Court recently granted certiorari to review the Eleventh Circuit's decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). The question presented in that case is whether the pumping and release of natural, unaltered surface water into navigable waters is an addition of a pollutant requiring an NPDES permit under the Act. Thus, the question presented here is, as the Ninth Circuit put it, "practically indistinguishable" from the issue in *Miccosukee*.

## RULES 29.6 AND 14.1 STATEMENT

WBI Holdings, Inc. owns 100 percent of the issued and outstanding common stock of Petitioner Fidelity Exploration & Production Company. Centennial Energy Holdings, Inc. owns 100 percent of the issued and outstanding common stock of WBI Holdings. MDU Resources Group, Inc. owns 100 percent of the issued and outstanding common stock of Centennial. No publicly-held company owns 10 percent or more of Fidelity stock.

Respondent in this case is Northern Plains Resource Council Inc., plaintiff and appellant below.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Fidelity Exploration & Production Company ("Fidelity") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The court of appeals' opinion is reported as *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155 (9th Cir. 2003).[1] App., *infra*, 1a-18a. The district court's judgment and order are unreported. App. 19a-22a. The district court issued an oral ruling. App. 23a-33a.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals entered judgment on April 10, 2003. On June 20, 2003, Justice O'Connor extended the time for filing a petition for certiorari to and including August 8, 2003. App. 34a.

[1] The Ninth Circuit's decision incorrectly referred to Fidelity as Fidelity Exploration & Development Company.

## STATUTORY PROVISIONS INVOLVED

Under Sections 301(a) and 402(a) of the federal Clean Water Act, 33 U.S.C. §§ 1311(a) & 1342(a), a National Pollutant Discharge Elimination System permit is required for "the discharge of any pollutant by any person." Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source. . . . " Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines "pollutant": "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

## STATEMENT OF THE CASE

### A. Fidelity's Operations

Fidelity extracts natural gas from underground coal seams in the Powder River Basin in northeastern Wyoming and southeastern Montana. Natural gas from coal seams is sometimes referred to as coal bed methane or coal bed natural gas. It is indistinguishable from what is commonly referred to as "natural gas" and is used to heat homes and businesses, to generate electricity, and for manufacturing uses. It is one of the cleanest burning fossil fuels. To extract coal bed natural gas, a well is drilled into the coal seam and some of the groundwater trapped within the seam is pumped to the surface. This relieves the water pressure within the seam, releasing the natural gas, which is then separately piped to the surface.

Throughout this process, no substance or chemical is added to the groundwater. When the unaltered groundwater reaches the surface, Fidelity manages the disposition of the water through various means, including releasing the water into the Tongue River, holding ponds, and livestock watering ponds. Local farmers, ranchers, and landowners throughout the Powder River Basin similarly pump water from coal seams for domestic and stock watering purposes and for use by wildlife.

### B. Montana's Regulation Of Releases Of Groundwater

Under the federal Clean Water Act, a National Pollutant Discharge Elimination System permit is required for the discharge of pollutants from a point source into navigable waters. The Act authorizes each state to establish "its own permit program for discharges into navigable waters within its jurisdiction." 33 U.S.C. § 1342(b). The United States Environmental Protection Agency has approved Montana's permit program. The Montana Department of Environmental Quality administers the program and issues permits for the discharges of pollutants to navigable waters within the State.

The Clean Water Act also requires each state to establish water quality standards for navigable waters within its jurisdiction. 33 U.S.C. § 1313(c)-(d). These standards define the beneficial uses for each water body (*e.g.*, recreation, propagation of fish and wildlife, public water supplies, etc.) and the specific limits for the water body that need to be maintained to support those uses.

The Clean Water Act therefore embodies a cooperative partnership between the states and the federal government to protect and enhance the quality of navigable waters, and relies heavily on the states to implement the Act. The Act is designed to protect water quality while at the same time limiting federal intrusion into state water management and regulation. Section 101(b) of the Act states: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA]. . . . " 33 U.S.C. § 1251(b). These policies are implemented through the state's setting of water quality standards for navigable waters within the state, through the NPDES permitting program through which the states enforce those water quality standards, and through non-NPDES state water quality programs. *See* 33 U.S.C. §§ 1288, 1313(e) & 1329 (state water quality programs).

The Montana Department of Environmental Quality, in implementing the Clean Water Act, regulates releases of unaltered groundwater to ensure the preservation and protection of water quality in navigable waters. As a component of its water quality program, Montana has enacted a statute providing that a permit is not required to discharge unaltered groundwater to surface water if standards protecting the quality of the receiving waters are met. In particular, Section 75-5-401(1)(b) of the Montana Code provides:

> Discharge to surface water of ground water that is not altered from its ambient quality does not

> constitute a discharge requiring a permit under this part if:
>
> > (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

With respect to Fidelity's releases of groundwater, the Montana Department of Environmental Quality reviewed the water quality data and determined that a permit was not required for releases into the Tongue River because the groundwater was not a waste and because the releases satisfied the water quality standards for the River, and so met the conditions specified in the Montana Code.[2]

Fidelity nevertheless elected to apply to the Montana Department of Environmental Quality for a discharge permit.[3] Currently, Fidelity's releases of unaltered

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[2] The Department also determined that the statutory permitting exemption did not apply to Fidelity's releases of groundwater into Squirrel Creek, a tributary of the Tongue River. Consequently, Fidelity does not release any groundwater into Squirrel Creek.

[3] In December 1998, EPA expressed concerns about Montana's permitting exemption. In January 1999, the Montana Department of Environmental Quality vigorously defended the statutory exemption, explaining to EPA that natural, unaltered groundwater is not a "pollutant" under the Clean Water Act because it does not contain any industrial waste, sewage or other wastes. In February 2001, well after the commencement of this lawsuit, EPA responded, suggesting that Montana amend the statute to clarify the meaning of the exemption.

groundwater to the Tongue River are authorized by a Montana discharge permit, even though the Department concluded that the statutory exemption applies to those releases. This dispute remains very real, however.[4]

### C. The Decisions Below

Northern Plains brought this suit to challenge Fidelity's releases of groundwater without an NPDES permit. Northern Plains argued before the district court that Fidelity's release of natural, unaltered groundwater was a discharge of pollutants requiring a permit under the Clean Water Act. The district court rejected this claim, finding that no permit was required because natural, unaltered water is not a "pollutant" under the Act's plain words. The district court ruled that unaltered groundwater does not fit within any of the categories listed in Section 502(6) of the Act, 33 U.S.C. § 1362(6), which defines the term "pollutant." App. 28a.

The Ninth Circuit, however, concluded that the water Fidelity releases into the Tongue River is a pollutant under the Act. In coming to this conclusion, the court relied on the Eleventh Circuit's decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). Citing *Miccosukee*, the Ninth Circuit ruled that the Act's requirement that pollution be "man-induced" refers to the effect on the receiving water, and applies even though the water being released is natural and unaltered by man. App. 12a. The

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[4] The case is not moot, as Northern Plains is suing for penalties for Fidelity's previous groundwater releases without a permit.

Ninth Circuit also relied on *Miccosukee* in concluding that "transporting water from one water body to another can violate the CWA." App. 14a.

The Ninth Circuit determined that the issues presented in this case are "practically indistinguishable" from the issues raised in *Miccosukee*. App. 14a-15a. On June 27, 2003, this Court granted certiorari in *Miccosukee* on the following question: "Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act."

## REASONS FOR GRANTING THE PETITION

1. **The Act's plain words.** The Clean Water Act states that "pollutant" "means" specific items listed in the Act. Water in its natural state is not on the list, and so is not a "pollutant" under the Act's plain words. The Ninth Circuit's ruling that natural, unaltered groundwater is a "pollutant" therefore does violence to the Act's plain words.

The Ninth Circuit nevertheless posits that natural water metamorphoses into a pollutant when, unaltered, it is released from one body of natural water into another. But there is no metamorphosis: Natural water not a pollutant before release is not transformed into a pollutant after release, because it is the same natural water before and after.

These violations of the statute's plain words and common sense offend the Act's purpose and upend the

balance and intrude upon the state-federal boundaries the Act sets. The Act leaves to the States regulation of water pollution that does not involve the discharge of pollutants from a point source. But the Ninth Circuit's ruling regulates releases of natural water that do not involve the discharge of pollutants, and runs over Montana's regulation of those releases, notwithstanding the Act leaves regulation of them to it.

The upshot is that the Ninth Circuit's ruling would federalize water management activities left to the States – including the transport and release of water for flood control, municipal water supply, environmental enhancement, and, as here, the release of natural groundwater. It would require an NPDES permit for virtually every release of natural water to another body of water, greatly expanding the NPDES program's reach. Western Senators, writing in support of granting certiorari in *Miccosukee*, warned about those dangerous excesses. The same dangers and excesses exist here, for this case remains, as the Ninth Circuit made clear, "practically indistinguishable" from *Miccosukee*.

The Court should grant certiorari to mandate that the Act be interpreted and administered in accordance with its plain words, and to keep the federal permitting scheme within the federalist boundaries Congress set for it.

2. **The Circuit Court conflict.** The Fourth, Sixth and District of Columbia Circuits hold that a Clean Water Act permit is not required for releases of water unless pollutants from the "outside world" are added to the water by the point source which releases it, and necessarily so: The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point

source." Thus, the point source must be the origin of the pollutants it releases.

The First, Second and Eleventh Circuits (*Miccosukee*), followed by the Ninth Circuit here, hold that the release of natural water from one body of water to another requires a permit even though the point source releasing the water adds no pollutants from the "outside world," or anywhere else, to it. Notwithstanding what the Act says, those circuits rule that the point source need not be the origin of the pollutants it releases.

This Court should grant certiorari to resolve that sharp circuit conflict, and so to eliminate the same dangers and excesses that the Ninth Circuit's misreading of "pollutant" creates.

## I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER RELEASE OF UNALTERED GROUNDWATER INTO A RIVER IS THE "ADDITION" OF A "POLLUTANT" FROM A POINT SOURCE UNDER THE CLEAN WATER ACT

### A. Water Is Not A Pollutant

The Act defines "pollutant" as follows: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The district court recognized that "pollutant" is a defined term under the Act and that groundwater does not fall within the Act's definition. The Ninth Circuit, however, concluded

that natural, unaltered water is a "pollutant" under the Act when it is transported from one water body and released into another, at least where the transported water's constituents are different from the receiving water's. App. 4a (stating that the groundwater Fidelity releases is "distinctly different" from the water in the Tongue River); and 14a (stating that "transporting water from one water body to another can violate the CWA").

If the Ninth Circuit's ruling is allowed to stand, any natural water transported from one water body and released into another would be a "pollutant" under the Act. As different waters inevitably contain different constituents, the Ninth Circuit's decision would effectively require an NPDES permit for virtually any release of water into any navigable water. That would greatly expand the reach of the Clean Water Act and impose enormous burdens on states such as Montana charged with implementing the federal NPDES permit program. If "transporting water from one water body to another can violate the CWA" because natural water is a "pollutant" under the Act, as the Ninth Circuit concludes (App. 14a), then it is difficult to imagine what is *not* covered by the Act's definition of "pollutant."

The Ninth Circuit recognized that the issue of whether water is a "pollutant" is "practically indistinguishable" from the issue presented by the Eleventh Circuit's decision in *Miccosukee*: i.e., whether the release of water into a navigable waterway constitutes the addition of a pollutant under the Act. App. 14a-15a. In *Miccosukee*, a bipartisan group of prominent United States Senators warned of the perils of requiring an NPDES permit for "any transfer of water containing a measurable quantity of constituents . . . even though the transfer of

water is in its natural condition, and the entity moving the water adds no pollutants." *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (Supreme Court No. 02-626), Petitioner's Supplemental Brief, App. 11a. Such an expansive rule would constrain the states' ability to manage water and interfere with land use planning decisions. *Id.*, App. 11a-12a. The Governor of Idaho similarly warned of the potential far reaching impacts and dangerous precedents that would result from both the Eleventh Circuit's decision in *Miccosukee* and the Ninth Circuit's decision in this case. *Id.*, App. 5a-10a. These decisions would affect water planning decisions throughout the West and place "state-delegated CWA programs on a slippery slope favoring the top-down regulatory decision making that 'cooperative federalism' models were designed to avoid." *Id.*, App. 8a-9a.

The implications of the Ninth Circuit's ruling extend far beyond this case. The ruling conflicts with the Clean Water Act's definition of "pollutant," enlarges the scope of the NPDES permit program, and threatens to upset the balance struck by the Act between state and federal interests.

### 1. The Clean Water Act's Definition Of "Pollutant" Does Not Include Releases Of Water

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), carefully interpreted the Act's definition of "pollutant." The court warned that the Act's "restrictive phrasing" of this term "makes us cautious in adding new terms to the definition." *Id.* at 171-72. The court observed that the definition of "pollutant" uses the precise term "means" rather than the looser phrase "includes" used

elsewhere in the Act. *Id.* at 171-72 & n.49.[5] This makes clear Congress intended the definition to mean exactly what it says it means. *Id.* at 172 ("[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated") (citations and internal quotation marks omitted).

*Gorsuch* also emphasized that both the Senate and the House had initially used unlimited phrasing to define "pollutant" – "'the term 'pollutant' means, *but is not limited to* . . . industrial, municipal, agricultural, and *other waste* discharged into water.'" *Id.* at 173 (quoting H.R. 11896, 92nd Cong., 2d Sess. § 502(6) (1972), *reprinted in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 893, 1068 (Comm. Print 1973) ("1972 Leg. Hist."); and S. 2770, 92nd Cong., 1st Sess. § 502(f) (1971), *reprinted in* 2 1972 Leg. Hist. at 1534, 1697 (emphasis added)). But the conference committee deleted "but is not limited to" and "other waste" and instead set forth a specifically limited definition: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." *See Gorsuch*, 693 F.2d at 173; S. Rep. No. 1236 (Conf. Rep.), 92nd Cong., 2d Sess. 143-44 (1972), *reprinted in* 1

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[5] For example, the Act defines "point source" broadly as "any discernible, confined and discrete conveyance, *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added).

1972 Leg. Hist. at 281, 326-27. *Gorsuch* therefore endorsed EPA's view that "Congress purposely limited the federal NPDES permit program to certain well-recognized pollutants and *left control of other water-altering substances or conditions to the states. . . .* " *Gorsuch*, 693 F.2d at 172 (emphasis added).

*Gorsuch* further emphasized the difference between the Act's limited definition of "pollutant" and the unlimited definition of "refuse" used in the Refuse Act of 1899. *Id.* at 172-73. The Refuse Act prohibited the discharge of "any refuse matter of any kind or description whatever . . . into any navigable water of the United States. . . . " 33 U.S.C. § 407.

The court similarly highlighted the distinctions between the Act's narrowly limited definition of "pollutant" and its broad definition of "pollution" in Section 502(19): "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). The court explained:

> [T]he broad term "refuse" was replaced with a list of specific items "so that litigable issues are avoided over the question of whether the addition of a particular material is subject to control requirements." Needless to say, if "pollutant" was intended to be as all-encompassing as "pollution," there would have been no need to fear litigation over what is included, and hence no need for such a definitional list.

*Gorsuch*, 693 F.2d at 173 (quoting S. Rep. No. 414, 92nd Cong., 1st Sess. 76 (1971), *reprinted in* 2 1972 Leg. Hist. at 1415, 1494).

*Gorsuch*'s reasoned analysis and its careful attention to the Act's words and legislative history demonstrate that Congress intended "pollutant" to mean what the Act says it means: the pollutants the Act lists and nothing more. Under any reasonable construction, natural, unaltered groundwater is not one of the "well-recognized pollutants" listed in 33 U.S.C. § 1362(6). *See Gorsuch*, 693 F.2d at 172.

Therefore, the Ninth Circuit's ruling that unaltered groundwater is a pollutant flatly conflicts with *Gorsuch* and does violence to the Act's plain words: Statutes must be read to mean what they plainly say, especially where they specifically provide they mean what they say. *See Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.") (citing *Colautti v. Franklin*, 439 U.S. 379, 392 & n.10 (1979)).

The Ninth Circuit's ruling does violence to the Act's spirit as well as its letter. The management of water is a local issue. *See* 33 U.S.C. § 1251(b), (g). As explained in the Western Senators' letter in support of the petition in *Miccosukee*, a rule requiring a permit for the simple transfer of natural water from one body to another would conflict with the well-established balance under the Clean Water Act between state and federal interests and threaten the states' ability to manage water resources. *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (Supreme Court No. 02-626), Petitioner's Supplemental Brief, App. 12a.

Natural groundwater is not a pollutant, and Fidelity's releases of this unaltered water are not an "addition" subject to regulation under the Clean Water Act in any

event.[6] The regulation of those releases should have been left to the State of Montana.

Montana has a regulatory system in place to ensure that releases of unaltered groundwater will not go unchecked. This system requires a permit for the release of groundwater in its ambient state unless the release meets all three of the following conditions: (a) it does not contain industrial waste, sewage or other wastes; (b) it does not cause the receiving water to exceed water quality standards for any parameters; and (c) it does not increase the concentration of those parameters for which the receiving waters already exceed such standards. *See* Montana Code § 75-5-401(1)(b). Fidelity's release of groundwater into the Tongue River met all of these conditions. The Ninth Circuit erred in misreading the Act's plain words, and it erred in overturning Montana's regulatory system for addressing water quality issues respecting releases of unaltered groundwater within the State.

### 2. The Ninth Circuit's Decision Ignores The Act's Distinction Between "Pollutants" And "Pollution"

The Ninth Circuit found that its conclusion that groundwater is a pollutant "is consistent with the CWA's definition of 'pollution.'" App. 11a. But this finding ignores the Act's definition of "pollutant" and blurs the critical distinctions between "pollutant" and "pollution." The NPDES permit program covers only the discharge of

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[6] *See* Part B, *infra*; *Gorsuch*, *supra*; *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

"pollutants." It does not extend to every release into navigable waters that might result in "pollution."

The Act defines "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). The Ninth Circuit held that Fidelity's releases of water into the Tongue River cause "pollution" because the released water affected the quality of the river water (App. 12a), even though the river continued to meet Montana's water quality standards.

Again, however, *Gorsuch* explained the critical differences between the Act's specific, item-by-item definition of "pollutant" on the one hand, and its "all-encompassing" definition of "pollution" on the other. 693 F.2d at 173, 176. In so doing, *Gorsuch* explained the limits of the NPDES permit program, which regulates only the discharge of "pollutants," and does not reach all water "pollution." The court explained:

> [I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, e.g., "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

*Id.* at 176. *See also National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988) (making the same distinction as *Gorsuch* between "pollutants" and "pollution"). *Gorsuch* therefore illustrates that releases to water that may involve "pollution" – but that do *not* constitute an addition of "pollutants" listed in the Act – are left to regulation by the states. *See, e.g.*, 33

U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate *pollution*. . . . ") (emphasis added).

The distinction between "pollutants" and "pollution" illustrates the cooperative federalism embodied in the Clean Water Act. The NPDES permitting scheme regulates the addition of specific "pollutants" from a point source to navigable waters, while non-NPDES state water quality programs supplement that scheme by regulating "pollution." The Ninth Circuit confused these two complimentary but distinct components of the Act, and it consequently erred in requiring an NPDES permit in this case.

In sum, the Ninth Circuit's reliance on the definition of "pollution" is misplaced and does not support the court's conclusion that natural water that isn't a pollutant by some alchemy becomes a "pollutant" when released into a navigable water.

### 3. The Water Fidelity Releases Into The Tongue River Is Not An "Industrial Waste" Or Other Pollutant Listed In The Act

The Ninth Circuit recognized that natural water is not listed as a pollutant in Section 502(6) of the Act, 33 U.S.C. § 1362(6). App. 9a. It ruled, however, that the water Fidelity releases into the Tongue River is a pollutant on the theory it is an "industrial waste." *Id.* This ruling conflicts with the Act's definition of "pollutant" and the meaning of "industrial waste."

The Ninth Circuit held that the natural groundwater Fidelity releases is an "industrial waste" under section 502(6) of the Act, 33 U.S.C. § 1362(6), because it is an "unwanted byproduct" of the methane extraction process. App. 10a.[7] Under the Ninth Circuit's logic, natural water that is not waste becomes "waste" when released to surface waters in connection with a commercial process, even though unchanged from its natural state. Therefore, any natural water used in connection with any commercial process metamorphoses into "industrial waste," although absolutely unaltered in any way by human activity. But there is no metamorphosis: Natural water that is not waste before used in some process and is not altered by the process is not waste after the process, because it is the same natural water before and after.

The Ninth Circuit rested its expansive reading of "industrial waste" on cases where chemicals were *added* to the water. Thus, in *Sierra Club Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 550 (5th Cir. 1996), "chemicals used in the drilling process become mixed with the water." Not surprisingly, the court found that the discharged water containing those added chemicals, and also containing waste oil and grease from the oil and gas extraction process, constituted both a "chemical waste"

[7] Relying on a dictionary definition, the Ninth Circuit concluded that the groundwater Fidelity releases is an "industrial waste" because, in the court's view, it is a "useless or worthless byproduct" of Fidelity's operations. App. 10a (quoting American Heritage Dictionary 1447 (1979)). But there is nothing to suggest that this water is "useless" or "worthless." To the contrary, the record shows that the water can be and is used for domestic purposes such as drinking and bathing, for the watering of livestock, for recreational purposes, and for use by wildlife.

and an "industrial waste." *Id.* at 567-68. Here, in sharp contrast, nothing is added to the water before it is released into the Tongue River and, as the Montana Department of Environmental Quality recognized, this water does not contain any wastes.

Similarly, in *Hudson River Fisherman's Assn. v. City of New York*, 751 F. Supp. 1088, 1094, 1101-02 (S.D.N.Y. 1990), *aff'd without op.*, 940 F.2d 649 (2d Cir. 1991), the City added chlorine and aluminum sulfate to the water. The court held the resulting residues of those chemicals in the water were "pollutants," although the chemicals were initially added for the beneficial purpose of disinfecting the water, emphasizing they were added to the water with the intention of creating a physical and chemical reaction in it. Likewise, in *Umatilla Waterquality Protective Assn. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1313, 1315, 1322 (D. Or. 1997), where a vegetable processing facility used a brine pond as a wastewater treatment system, the court relied on the *Hudson River* case in finding that the residues from the pond were both "chemical wastes" and "industrial wastes."

In sum, case law does not support the Ninth Circuit's sweeping conclusion that natural water becomes an "industrial waste" when released in the same natural state into a navigable waterway from a commercial facility.[8]

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[8] The Ninth Circuit also pointed to Fidelity's permit application, which referred to the groundwater as "wastewater." App. 10a. But this is a far cry from saying that the water – which is unaltered from its natural state – is "chemical waste" or "industrial waste" and therefore a "pollutant" under the Clean Water Act's definition. Use of the term

(Continued on following page)

The Ninth Circuit also found that Fidelity's groundwater is "produced water" and is therefore necessarily a "pollutant" under the Act. App. 10a. But the Act does not list "produced water" as a "pollutant."[9] Nor does the *Cedar Point* case the Ninth Circuit relied on support the proposition that natural groundwater is a pollutant. In *Cedar Point*, the "produced water" from oil and gas extraction contained chemicals added during the drilling process, as well as waste oil and grease, so it fit the meaning of chemical and industrial waste. 73 F.3d at 550, 568.[10] Here,

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"wastewater" in Fidelity's permit application cannot change what the water is – natural, unaltered groundwater – or what the statute means.

[9] The regulatory definitions of "produced water" cited by the Ninth Circuit (App. 10a) do not even apply to Fidelity's operations. These regulations apply to offshore oil and gas operations (40 C.F.R. § 435.11(bb)) and coastal oil and gas operations (40 C.F.R. § 435.41(bb)). The regulations define "produced water" as "brine," reflecting the fact that this water originates from beneath the sea. And the specific standards in the regulations for "produced water" govern the amount of waste oil and grease (*see, e.g.*, 40 C.F.R. §§ 435.12, 435.13, 435.14, 435.15), which Fidelity's groundwater does not contain.

[10] *Cedar Point* emphasized that the "produced water" contained constituents listed as "pollutants" by EPA regulations. 73 F.3d at 568. But the fact that EPA has adopted standards for specific constituents under the NPDES program does not make all water containing a measurable quantity of any listed constituent a "pollutant" under the Act. If that were the case, the water in the Tongue River would itself be a "pollutant," since it contains constituents listed in the EPA regulations. The EPA standards relied on by *Cedar Point* do not expand the categories of "pollutants" beyond those defined in the Act. Rather, the standards are necessary as an administrative tool to establish effective effluent limitations in NPDES permits for specific constituents and to implement water quality standards, which define the limits for these constituents in the receiving water. The Montana Department of Environmental Quality has determined that Fidelity's releases of unaltered groundwater to the Tongue River meet the water quality standards for the River.

nothing is added to the water, so when released it is neither chemical nor industrial waste.

Finally, the Ninth Circuit pointed to 33 U.S.C. § 1362(6)(B). App. 11a. It provides that "pollutant" does *not* mean:

> water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

The court concluded that the water here must be "a pollutant within the plain meaning of the CWA and is subject to NPDES permitting requirements," because Fidelity does not re-inject the groundwater into a well. App. 11a. But this reasoning is backwards. The groundwater Fidelity releases does not fall within any of the specific categories in the Act's definition of pollutants and it is therefore not a "pollutant." An exemption from the statutory definition cannot be relied on to infer that the exclusive list of pollutants in the statute should be read to include a category not listed in it in the first place.

The Clean Water Act defines "pollutant." This definition does not include water in its natural state. This Court should grant certiorari to correct the Ninth Circuit's error in expanding the reach of the statute, a significant federal question, and to resolve the conflict between the Ninth Circuit and other circuit courts.

### B. The Courts Of Appeal Are Sharply Divided Over Whether The Release Of Water Is An "Addition" Of Pollutants Under The Clean Water Act

This Court should grant review of the Ninth Circuit's decision because the federal courts of appeal are deeply divided over the NPDES permit program's scope. To support its expansive interpretation of the Act's permitting requirements to cover releases of natural water into a river, the Ninth Circuit relied on a line of cases culminating in *Miccosukee*, pointing out that the issue presented here is "practically indistinguishable from the issues considered by these cases." App. 14a-15a. The issue at the heart of those cases is whether the release of natural water from one water body into another constitutes the "addition" of a pollutant from a point source requiring an NPDES permit.[11]

The conflicting circuit court cases establish two very different tests for whether the release of water requires an NPDES permit. *Gorsuch* and *Consumers Power* hold that a permit is required only where a point source physically introduces pollutants to water from the "outside world," and releases the water with those pollutants added to it into receiving waters. *See Gorsuch*, 693 F.2d at 174-75;

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[11] The Ninth Circuit first noted that the only issue in this case was whether the water discharged by Fidelity into the Tongue River is a "pollutant" within the meaning of the Act. App. 7a, 8a. The Ninth Circuit therefore did not address head-on the issue of whether there was an "addition" of pollutants from a point source. The court ultimately concluded, however, that these two issues were essentially the same. The court therefore concluded that *Miccosukee* governed. App. 14a-15a.

*Consumers Power*, 862 F.2d at 584, 586. Therefore, an NPDES permit is not required where – as here – natural water from one water body is released into another body of water and nothing is added to the water that is released.

In sharp contrast, *Miccosukee* held that an NPDES permit is required whenever a point source releases water into the receiving water and the release may affect the quality of the receiving water – regardless of whether the point source itself added anything to the released water and so is the origin of the constituents in it. Thus, *Miccosukee* focused solely on the effect on the receiving water – a "pollution" question and therefore the wrong question – and treated as irrelevant the question of whether the point source adds, or does not add, pollutants to the water being released – a "pollutant" question and therefore the right question. 280 F.3d at 1368 & nn.5, 6. The Ninth Circuit agreed. App. 12a (quoting *Miccosukee*, 280 F.3d at 1368). The statute says otherwise. The Court should grant certiorari to resolve this split of authority.

### 1. The Traditional Rule That An "Addition" Of Pollutants Does Not Occur Unless The Point Source Physically Introduces Pollutants From The Outside World

The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). *Gorsuch* thus recognized that no permit is required under the Act unless "the point source itself physically introduces pollutants into water from the outside world." 693 F.2d at 174-75. The *Gorsuch* plaintiffs argued that the EPA was required to regulate dams under the NPDES permit program

because release of natural water from them causes pollution downstream. The court rejected this position. It held that a permit was not required where water is released by a point source from one body of water (the reservoir) into another (the river), where the point source adds nothing to the water. *Id.* Although the release of water from the reservoir into the river would cause "pollution" in the river, the court found there was no "addition" of a "pollutant" since nothing from the "outside world" was added to the water being released. *Id.* at 174-76.

Following *Gorsuch*, the Sixth Circuit in *Consumers Power* held that no permit was required where a hydroelectric facility pumped water out of Lake Michigan, significantly altered that water by killing a large number of fish and other aquatic organisms as the water passed through the facility's energy-generating turbines, and then released the water along with the dead fish and fish remains into the lake. The court held there was no "discharge" within the meaning of the Clean Water Act, since the facility did not "add" any pollutants into the lake: The facility did not create the fish killed by the turbines, for the fish were in the water from the beginning. *Consumers Power*, 862 F.2d at 584-86. Therefore, any water quality change in the lake resulting from the release of dead fish and fish remains into it was not "from the physical introduction of a pollutant from the outside world." *Id.* at 586.[12]

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[12] *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1975), also made clear that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial dischargers, do not constitute an addition of pollutants by a plant through which they pass." 545 F.2d at 1377.

If no NPDES permit was required in *Consumers Power, a fortiori,* no permit is required here. As in *Consumers Power,* Fidelity does not create the constituents contained within the groundwater that it releases into the Tongue River, so Fidelity does not add anything to that water from the outside world. And, *unlike* the facility in *Consumers Powers* – which significantly altered the discharged water by destroying fish and other aquatic creatures in it – Fidelity does not alter the groundwater in any manner at all.

### 2. The Contrary Test Followed By The Ninth Circuit

The Ninth Circuit followed *Miccosukee* and the line of cases preceding it. They established a very different test from *Gorsuch.* Thus, *Dubois v. United States Dept. of Agriculture,* 102 F.3d 1273 (1st Cir. 1996), held that a permit was required for the release of water from a river into a pond, on the ground that this release would not have occurred naturally, so it was an "addition" to the receiving waters from a point source.[13] *Dubois* distinguished *Gorsuch* as involving "a dam that merely accumulates the same water," and not the transport of water from one water body to another. *Dubois,* 102 F.3d at 1299. But *Gorsuch* was not based on the fact that the reservoir and the receiving river were "the same water." To the contrary, *Gorsuch* made clear that the water does, in fact, pass

[13] In *Dubois,* a ski resort company took water from a river, pumped it through snowmaking equipment without adding anything to it, and then released it into a pond.

through a point source from one body of water (the reservoir) into another (the river). *Gorsuch*, 693 F.2d at 165, 175.[14] Furthermore, in *Gorsuch*, the release of water from the reservoir causing pollution in the river occurred only because the upstream river was dammed, and would not have occurred naturally.[15] *Dubois* ignored that fact, and the conflict between *Dubois* and *Gorsuch* remains unresolved.

The same is true for *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492-93 (2d Cir. 2001), which also erroneously distinguished *Gorsuch* "as involving movement of water within the same water body." *Catskill* held that a permit was required for the release of water from a reservoir into a creek.[16] Like the First Circuit in *Dubois*, the court emphasized that water from the reservoir would not reach the creek "[u]nder natural conditions," *id.* at 484, and held the transfer of water from one body of water to another constituted an "addition" of pollutants requiring a permit, even though the point source added nothing to the water it transferred. *Id.* at 493.

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[14] In holding that a permit was required, *Miccosukee* emphasized that while the water being discharged and the receiving water were formerly part of the same natural water body, they are now separate bodies of water because man separated them with levees, canals and impoundments. *Miccosukee*, 280 F.3d at 1369 n.8. Similarly, in *Gorsuch*, man made the reservoir and the downstream river separate bodies of water by constructing the dam.

[15] Similarly, in *Consumers Power*, the release of dead fish and fish remains into Lake Michigan occurred only because of the hydroelectric facility, and would not have occurred naturally.

[16] In *Catskill*, New York City transferred water from a reservoir, through a tunnel, and into a creek feeding another reservoir.

*Miccosukee* further illustrates the deep conflict between the circuits. Like *Dubois* and *Catskill*, *Miccosukee* held that a permit was required for the release of water from one water body into another. The court announced a "but for" test, concluding that "for an addition of pollutants to be from a point source, the relevant inquiry is whether – but for the point source – the pollutants would have been added to the receiving body of water," 280 F.3d at 1368, notwithstanding the point source added nothing to the water. The court dismissed the *Gorsuch* rule that the point source must be the source or origin of the pollutants. *Id.* at 1368 n.6.

This case intensifies the conflict among the circuit courts on this issue. The Ninth Circuit followed *Miccosukee*, *Catskill*, and *Dubois*, and concluded that those cases "apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another." App. 14a-15a. Following the *Miccosukee* "but for" test, the Ninth Circuit relied on the fact that the released groundwater "would not flow into the Tongue River *but for* Fidelity's methane extraction process. . . . " App. 13a (emphasis added).

### 3. Review By This Court Is Needed To Resolve The Conflict

The conflict between the circuits is very clear and very real. Under *Gorsuch*, *Consumers Power* and *Appalachian*, a release of natural water from a point source does not trigger the need for an NPDES permit, unless the point source adds pollutants to the water being released. In other words, the point source must be the source or origin

of pollutants. Under the Ninth Circuit's decision in this case, *Catskill*, *Dubois* and *Miccosukee*, however, the point source need not be the origin of pollutants, or add anything at all to the natural water it releases. The only issue under these cases is whether the released water is different from the receiving waters and whether the release would occur but for the point source.

Supreme Court review is needed to resolve the sharp conflict between the circuits and to establish that the Clean Water Act means what it says. The Ninth Circuit's ruling that transporting unaltered, natural water from one water body to another violates the Clean Water Act extends the scope of the NPDES permitting program to include virtually all releases of natural water into navigable waters. The ruling threatens to federalize water management activities that have historically been left to the states – including the transport and release of water for flood control, municipal water supply, and environmental enhancement. *See, e.g., South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (Supreme Court No. 02-626), Petitioner's Supplemental Brief, App. 11a (Western Senators explaining that the transfer of water for a wide variety of state and local purposes is a routine practice managed by the states). For example, many communities in the West rely on conjunctive use programs involving the integrated management of ground and surface waters and the release of groundwater to surface waters when needed. Under the Ninth Circuit's logic, this critical aspect of water supply would be subject to NPDES permitting requirements. The Court should grant review to correct the Ninth Circuit's error on this important national issue.

## II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT CERTIORARI PENDING THE COURT'S UPCOMING DECISION IN *MICCOSUKEE*

This Court recently granted certiorari to review the Eleventh Circuit's decision in *Miccosukee*. The question presented in *Miccosukee* is whether the pumping of water that adds nothing to the water being pumped constitutes the addition of a pollutant from a point source triggering the need for an NPDES permit. The Ninth Circuit expressly relied on *Miccosukee* and recognized that the issues presented in this case are "practically indistinguishable" from those presented in *Miccosukee* and its predecessors. App. 14a-15a.

This Court's decision in *Miccosukee* will likely resolve the issues presented in this case. Accordingly, at a minimum the Court should grant this petition for certiorari and hold this case pending the Court's decision in *Miccosukee*. In the event the Eleventh Circuit's decision in *Miccosukee* is reversed in whole or in part, the Ninth Circuit's decision should be vacated and the case either set for argument in this Court or remanded for rehearing in light of this Court's decision in *Miccosukee*.

## CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, granted and the case held pending the Court's ruling in *Miccosukee*.

Respectfully submitted.

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325 F.3d 1155

**NORTHERN PLAINS RESOURCE COUNCIL, Plaintiff-Appellant,**

**v.**

**FIDELITY EXPLORATION AND DEVELOPMENT COMPANY, Defendant-Appellee.**

**No. 02-35836.**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 4, 2003.

Filed April 10, 2003.

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Appeal from the United States District Court for the District of Montana; Sam E. Haddon, District Judge, Presiding. D.C. No. CV-00-00105-SEH.

Before REINHARDT, W. FLETCHER, and GOULD, Circuit Judges.

## OPINION

GOULD, Circuit Judge.

Defendant-Appellee Fidelity Exploration & Development Company ("Fidelity") extracts methane gas for commercial sale from coal seams located deep underground in the Powder River Basin, Montana. In the process of extracting coal bed methane (CBM), Fidelity pumps groundwater to the surface and discharges this water into the Tongue River. The water discharged is "salty," contains several chemical constituents identified as pollutants by Environmental Protection Agency (EPA) regulations, has characteristics that may degrade soil, and is unfit for irrigation. The Montana Department of Environmental Quality (MDEQ) advised Fidelity that no permit was required to discharge the coal bed methane groundwater because Montana state law exempts unaltered groundwater from state water quality requirements. Plaintiff-Appellant Northern Plains Resource Council (NPRC) filed a citizen suit under the federal Clean Water Act (CWA) in the District Court for the District of Montana, alleging that Fidelity unlawfully discharged pollutants into navigable waters of the United States. NPRC appeals the district court's grant of summary judgment to Fidelity.

On appeal, we decide (1) whether the CBM discharge water is a "pollutant" within the meaning of the CWA, and (2) whether Montana state law can exempt Fidelity from obtaining National Pollution Discharge Elimination System (NPDES) permits under the CWA. We hold that

the unaltered groundwater produced in association with methane gas extraction, and discharged into the river, is a pollutant within the meaning of the CWA. We also hold that states cannot create exemptions to the CWA, whether or not the EPA has delegated permitting authority to the state.

## I

In 1997, Fidelity began exploring and developing natural gas from coal seams in the Powder River Basin, Montana. The coal reserves in Powder River Basin are several hundred feet below the ground and contain reservoirs of methane gas. The methane is trapped by groundwater that fills the interstitial areas of the coal reserves. To extract the methane, Fidelity drills a conventional well into the coal seam and pumps the trapped water to the surface to reduce water pressure. This pumping releases the trapped methane, which is captured at the surface and piped to market. Fidelity does not add chemicals to the pumped groundwater (CBM water). Fidelity discharges the unaltered CBM water into the Tongue River. Because CBM water comes from deep underground aquifers, it would not reach the Tongue River were it not for Fidelity's extraction process.

Though Fidelity does not add any chemicals to the CBM water before discharge, the water in its natural state contains suspended solids, calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, and fluoride. The CBM water also contains measurable quantities of the following metals: aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium.

The CBM water is "salty," a characteristic measured by total dissolved solids or specific conductance. The mean total dissolved solids for the Tongue River is 475 mg/l as compared to 1,400 mg/l for the CBM water. Related to the "saltiness" of the CBM water is the water's high Sodium Absorption Ratio (SAR). SAR measures the ratio of sodium to calcium and magnesium in the water. The SAR of the CBM water discharged by Fidelity is on average 40 to 60 times greater than the background SAR of the Tongue River. For all these reasons, the CBM water is distinctly different from the Tongue River water to which it is added.

Farmers who use water from the Tongue River for irrigation are concerned with the "saltiness" and high SAR of CBM water because of the potential hazards these characteristics pose to soil structure. High SAR water, such as CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water. The Montana Department of Environmental Quality (MDEQ), in a Final Environmental Impact Statement analyzing coal bed methane extraction, warns that "clayey" soil, like that in the Tongue River Valley, is vulnerable to damage from high SAR water. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereinafter "Montana FEIS"), Soils Appendix SOI-1, *available at* www.deq.state.mt.us/CoalBedMethane/finaleis.asp. Fidelity's soil expert concluded that "the SAR of CBM water creates a permeability hazard and precludes its use for irrigation without mixing, treatment or addition of soil amendments." The MDEQ cautioned that unregulated discharge of CBM water would cause "[s]urface water quality in some watersheds [to] be slightly to severely

degraded, resulting in restricted downstream use of some waters." *Id.* 4-72. Some of the CBM water, however, is used by Fidelity's grazing lessee, CX Ranch, in livestock watering ponds and stock tanks.

In August 1998, Fidelity contacted the MDEQ about the possibility of discharging its CBM water into the Tongue River and Squirrel Creek. By letter, the MDEQ told Fidelity that it did not need a permit from the MDEQ to discharge into the Tongue River because the discharge was exempt under Montana Code section 75-5-401(1)(b), which provides:

> Discharge to surface water of groundwater that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if:
>
> > (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

The MDEQ, however, warned Fidelity in the same letter that "the EPA, which provides state program oversight under the federal Clean Water Act, does not agree with the [Montana] Water Quality Act permit exclusion under 75-5-401(1)(b). Therefore, they may ask at some point that you obtain an [Montana Pollution Discharge

Elimination System (MPDES) ] permit from us, or an NPDES permit from them."[1] The EPA told MDEQ that section 75-5-401(1)(b) of the Montana Code conflicts with the CWA because it exempts some discharges otherwise subject to the CWA from NPDES permitting requirements. The EPA stressed that "the fact that a discharge does not increase the concentration of a particular parameter does not exempt it from permitting requirements." The MDEQ responded, resisting revocation of the section 75-5-401(1)(b) exemption and arguing that "the exemption is consistent with federal requirements governing NPDES programs because discharges of unaltered, natural groundwater do not contain 'pollutants' as that term is defined under the Clean Water Act." In a final letter sent to the MDEQ by the EPA, the EPA reiterated its objection to section 75-5-401(1)(b) if applied to discharges that would otherwise require a permit under the CWA.

Even though MDEQ informed Fidelity in August 1998 that Montana state law exempted the discharge of unaltered groundwater, Fidelity filed MPDES permit applications in January 1999. At that time, Fidelity was discharging into both Squirrel Creek and the Tongue River without a permit.

NPRC sent a 60-day Notice of Intent to Sue letter to Fidelity, the MDEQ, and the EPA on April 18, 2000. NPRC alleged unpermitted discharges of pollutants into Squirrel Creek and the Tongue River. On June 23, 2000, NPRC

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[1] Congress has authorized both the EPA and states to implement CWA permit programs. *See* 33 U.S.C. § 1342(a)-(b). The EPA issues NPDES permits, whereas Montana issues MPDES permits.

filed a citizen suit under the CWA in federal district court alleging unpermitted discharges into Squirrel Creek. An amended complaint was filed on June 26, 2000, to add allegations of unlawful discharges into the Tongue River from outfalls not covered by an MPDES permit.[2]

The parties filed cross-motions for summary judgment in district court. The parties stipulated that of the five elements necessary to prove a violation of the CWA ((1) discharge, (2) pollutant, (3) from a point source, (4) to a navigable water, (5) without a permit), the only element at issue is whether the CBM water constitutes a pollutant; the other four elements are satisfied. The district court held that the CBM water was not a pollutant and granted summary judgment to Fidelity. NPRC appeals.[3]

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[2] On June 16, 2000, the MDEQ issued Fidelity an MPDES permit authorizing Fidelity to discharge into the Tongue from seven specified outfalls. The MDEQ did not issue a permit to discharge into Squirrel Creek. Even though the MPDES permit allowed discharge into the Tongue River from seven outfalls, Fidelity discharged from twelve outfalls and continued to do so until the MDEQ amended the permit on July 3, 2000, to allow discharge from ten outfalls. Fidelity did not receive an amended permit allowing discharge from ten outfalls until after the amended complaint was filed.

[3] Three amici briefs were filed in this case: (1) The Western Environmental Trade Association (WETA) filed a brief in support of Fidelity. WETA is an extraction industry advocacy group; (2) Tongue & Yellowstone Irrigation District and Tongue River Water Users' Association (T & Y) filed a brief in support of NPRC. T & Y is a group of ranchers and farmers who depend on the Tongue River for irrigation; and (3) Northern Cheyenne Tribe (Tribe). The Tongue River forms the eastern boundary of the Tribe's Reservation.

## II

The CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. *See also Ass'n to Protect Hammersley, Eld, and Totten Inlets (APHETI) v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir.2002). Fidelity and NPRC agree that Fidelity discharged CBM water from a point source into navigable water without an NPDES permit. Given this agreement, we need only decide whether the groundwater derived from CBM extraction is a "pollutant" within the meaning of the CWA.

The district court granted summary judgment to Fidelity based on two conclusions: (1) CBM produced water is not a pollutant within the meaning of the CWA, and (2) Montana state law exempted Fidelity from CWA permitting requirements. We have jurisdiction, 33 U.S.C. § 1365(a); 28 U.S.C. § 1331, we review the district court's grant of summary judgment de novo, *see Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir.2002), and we reverse.

To determine whether CBM water is a "pollutant" regulated by the CWA, we begin with the plain language of the statute. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). The CWA defines "pollutant" broadly:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and *industrial,* municipal, and agricultural *waste* discharged into water. This term does not mean . . . water, gas, or other material which

> is injected into a well to facilitate production of oil and gas, *or water derived in association with oil or gas production and disposed of in a well,* if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6) (emphasis added). Because this definition does not literally list "unaltered groundwater" as a pollutant, Fidelity argues, and the district court held, that CBM water is not a "pollutant." Fidelity's argument and the district court's holding are untenable. The plain language of the CWA requires the conclusion that CBM water is a pollutant subject to regulation under the CWA.

The reasons for our conclusion are apparent from the statute's terms. First, CBM water is a "pollutant" because it is "industrial waste." Contrary to Fidelity's suggestion that "industrial waste" refers to "sludge oozing from manufacturing or processing plants, barrels filled with toxic slime, and raw sewage floating in a river," industrial waste is not limited to only the most heinous and toxic forms of industrial byproducts. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,* 73 F.3d 546, 568 (5th Cir.1996) (concluding "produced water" is encompassed in "industrial waste"); *see also Hudson River Fishermen's Ass'n v. City of New York,* 751 F.Supp. 1088, 1101 (S.D.N.Y.1990) (holding that chlorine residues are pollutants), *aff'd,* 940 F.2d 649 (2d Cir. 1991); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.,* 962 F.Supp. 1312, 1322 (D.Or.1997) (holding that brine residues are industrial waste and therefore pollutants). "Industrial" means "of, pertaining to, or derived from industry." American Heritage

Dictionary 672 (1979). "Industry," in turn, is defined as "the commercial production and sale of goods and services." *Id.* "Waste" is defined as "any useless or worthless byproduct of a process or the like; refuse or excess material." *Id.* at 1447. Combining these ordinary meanings, "industrial waste" is any useless byproduct derived from the commercial production and sale of goods and services. Because Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM water falls squarely within the ordinary meaning of "industrial waste." Even Fidelity referred to CBM water as "wastewater" in its application to the EPA for an NPDES permit.

Second, CBM water is also a "pollutant" by virtue of being "produced water" derived from gas extraction. *See Cedar Point Oil Co.*, 73 F.3d at 568 (addressing whether discharge of water "produced" during the extraction of oil and gas without an NPDES permit violated the CWA and concluding that produced water is an "industrial waste" regulated by the CWA). The EPA defines "produced water" as "water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and *can* include formation water, injection water, and any chemical added downhole or during the oil/water separation process." 40 C.F.R. §§ 435.41(bb), 435.11(bb) (emphasis added). Fidelity argues that the CBM water is not "produced water" because Fidelity adds no chemicals to the water. Whether CBM water is "produced water," however, does not turn on the addition of chemicals or any other alteration. The EPA regulations provide that "produced water" *can* include added chemicals, but the definition does not require it. *See id.* CBM water is "produced water" because it is brought

up from the coal seams underlying Powder Basin to extract methane gas.

The CWA contemplates that produced water, as defined by EPA regulations, is a pollutant within the meaning of the Act. The CWA only exempts water derived from gas extraction from regulation when the water is disposed of in a well and will not result in the degradation of other water bodies. 33 U.S.C. § 1362(6)(B). *Cf. Cedar Point Oil,* 73 F.3d at 568 ("produced water" is a pollutant if its discharge does not meet exemption criteria). Fidelity disposes of the CBM water by direct discharge to the Tongue, not by reinjection into a state-approved well. Because Fidelity discharges "produced water" and does not meet § 1362(6) exemption criteria, the CBM water discharged by Fidelity is a pollutant within the plain meaning of the CWA and is subject to NPDES permitting requirements.

Third, concluding that CBM water is a pollutant is consistent with the CWA's definition of "pollution." *Cf. APHETI,* 299 F.3d at 1017 (considering the definition of "pollution" to determine whether biological materials emitted by mussels are "pollutants"). "Pollution" is the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). By discharging CBM water into the Tongue River, Fidelity alters the water quality of the Tongue River. In particular, the MDEQ, in the Montana Environmental Impact Statement analyzing the impact of CBM production on Montana waterways, cautions that the resulting alteration may degrade, and limit uses of, the receiving water: "Surface water quality in some watersheds would be slightly to severely degraded, resulting in restricted downstream use of some waters." Montana FEIS

at 4-72. And, unregulated discharge of CBM water to the Tongue River threatens to make the water unfit for irrigation. *Id.* at 4-138.

Because Fidelity's discharges of CBM water alter the water quality of the Tongue River, those discharges cause "pollution" as defined by the CWA. *See PUD No. 1 of Jefferson County. v. Wash. Dep't of Ecology,* 511 U.S. 700, 705, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) (citing 33 U.S.C. § 1313(d)(4)(B) and recognizing CWA's "antidegradation policy" requiring state water quality standards to prevent further degradation of the Nation's waters); 40 C.F.R. § 131.12 (antidegradation policy regulation). Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a "pollutant," even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly "undermine the integrity of [the CWA's] prohibitions." *APHETI,* 299 F.3d at 1016.

The district court determined that the CWA's definition of "pollution" supports a conclusion that CBM water is *not* a pollutant because Fidelity does not alter the CBM water before discharging it. We disagree with the district court's interpretation of the definition. The requirement that the physical, biological, or chemical integrity of the water be a "man-induced" alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man. *See Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.,* 280 F.3d 1364, 1368 (11th Cir.2002) ("[I]n determining whether pollutants are added to the navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water."). A contrary reading of the definition is

illogical because the goal of the CWA is to protect receiving waters, not to police the alteration of the discharged water. *See* 33 U.S.C. § 1251 (The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Here, the alteration of the chemical integrity of the Tongue River is "man-induced," as the CBM water would not flow into the Tongue River but for Fidelity's methane extraction processes, and that must be a focus of our concern under the CWA. Contrary to the district court's conclusion, the definition of "pollution" supports a finding that CBM water *is* a pollutant.

In arguing that CBM water is not a pollutant, Fidelity makes much of the fact that the CBM water is "unaltered," "naturally occurring," and that it is only water. Fidelity relies on *APHETI* to argue that only those substances "transformed by human activity" can be pollutants under the CWA. *See APHETI,* 299 F.3d at 1017. Fidelity misapplies *APHETI.*

In *APHETI,* we clarified the meaning of "biological materials," a term included in the CWA's definition of "pollutant." *Id.* at 1016; *see also* 33 U.S.C. § 1362(6). In considering whether excrement from mussels suspended from rafts in Puget Sound was a pollutant under the CWA, we distinguished between biological materials that naturally occur in receiving waters, such as mussel feces, and biological materials that result from human activity, such as the "heads, tails, and internal residuals" of fish dumped back into the waters after processing. *APHETI,* 299 F.3d at 1017. Because one purpose of the CWA is to protect shellfish, we concluded that shellfish are not pollutants under the CWA unless human activity transforms them.

*Id.* This conclusion was necessary to preserve the "integrity of the [CWA's] prohibitions." *Id.* at 1016.

*APHETI* cannot sensibly be read to require human transformation of all materials identified in the CWA's definition of "pollutant." For one thing, the CWA definition of "pollutant" includes such terms as "rock," "sand," and "heat." *See* 33 U.S.C. § 1362(6). It is the introduction of these contaminants, not their transformation by humans, that renders them pollutants. Also, by allowing the degradation of the quality of receiving waters, the consequences of Fidelity's interpretation of *APHETI* would upset the integrity of the CWA, a result that *APHETI* was careful to avoid. Fidelity's interpretation of *APHETI* is not correct, for it would allow someone to pipe the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes. Or, water naturally laced with sulfur could be freely discharged into receiving water used for drinking water simply because the sulfur was not added to the discharged water. Such an argument cannot sensibly be credited.

Even though Fidelity argues that CBM discharges are "only water," other circuits have held that transporting water from one water body to another can violate the CWA. *See Miccosukee Tribe,* 280 F.3d at 1367 (affirming the district court's grant of summary judgment to the plaintiffs where the defendant discharged already polluted water into a navigable water even though the defendant did not introduce additional pollutants into the discharged water but only rerouted the discharged water into the receiving water); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 492-93

(2d Cir. 2001) (concluding that the transfer of water containing pollutants from one body of water to another requires an NPDES permit); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir.1996) (holding that the transfer of water from one body of water to another distinct body of water requires a NPDES permit where the discharged water contains pollutants).

Fidelity attempts to distinguish these cases because they addressed the issue of whether there was an "addition" of a pollutant under the CWA, not whether there was a pollutant. This distinction is inapposite. The issue of whether CBM water is a pollutant is practically indistinguishable from the issues considered by these cases. Fidelity is transporting water from the deep aquifers of the Powder Basin and discharging that unaltered water into the surface water of the Tongue River. Similarly, each of the cases cited above involve transport of water that could degrade the water quality of receiving waters. The cases apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another.

In light of the CWA's definition of pollutant and pollution, our precedent in *APHETI,* and the conclusions of other circuits in analogous cases, we reject Fidelity's arguments and hold that CBM water is a pollutant pursuant to the CWA.

## III

Having concluded that Fidelity's discharge of CBM water is subject to the CWA, we next consider whether Fidelity nevertheless can be relieved of permitting under

the CWA by Montana state law. Section 75-5-401(1)(b) of the Montana Code provides:

> Discharge to surface water of groundwater that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if:
>
> > (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

Based on Montana Code section 75-5-401(1)(b), the MDEQ advised Fidelity that no permit was needed to discharge CBM water into the Tongue River. The district court agreed, reasoning that the EPA implicitly approved of Montana's groundwater exemption because the EPA did not revoke Montana's authority to operate the EPA-approved state permitting program despite section 75-5-401(1)(b). Giving deference to the EPA's "approval" of Montana's permitting program, the district court concluded that discharge of CBM water does not require a permit under Montana state law and thus does not violate the CWA. We disagree with the district court's conclusion for several reasons.

First, though the district court reasoned that the EPA approved of section 75-5-401(1)(b), the EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only Congress may amend the CWA to create exemptions from regulation. *See Am. Mining Congress v.*

*E.P.A.*, 965 F.2d 759, 772 (9th Cir.1992) (citing *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1374 (D.C.Cir. 1977)). The EPA could not have approved of the MDEQ's exemption of CBM water discharges under section 75-5-401(1)(b) even if the EPA wanted to do so.[4]

Second, Montana has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process. *See* 33 U.S.C. § 1370 (states may not adopt or enforce standards that are less stringent than federal standards). Just as the EPA does not have the authority to create an exemption for unaltered groundwater, neither does the State of Montana, as the EPA cannot delegate to a state more authority than the EPA has under the CWA.[5]

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[4] Judicial deference to agency action is not warranted where the agency had no authority to act. *See United States v. Mead*, 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (*Chevron* deference applies only when Congress explicitly or implicitly gave the agency authority to fill certain gaps left by Congress). Therefore, the district court erred in giving judicial deference to the EPA's implicit "approval" of Montana's groundwater exemption. Congress did not grant the EPA the authority to create such exemptions.

[5] Even if the EPA could have approved of the MDEQ's application of section 75-5-401(1)(b), the EPA did not do so here. In a letter sent to the MDEQ, the EPA disapproved of the application of section 75-5-401(1)(b) to discharges that would otherwise be regulated under the CWA. The MDEQ, however, maintained that the exemption was consistent with the CWA because "discharges of unaltered, natural groundwater do not contain 'pollutants' as that term is defined" in the CWA. In a subsequent letter to the MDEQ, the EPA stated that revocation of Montana Code section 75-5-401(1)(b) would not be necessary *if* the MDEQ does not interpret that provision to authorize "any point source discharge of any pollutant to any water of the United States without an NPDES permit."

Moreover, absent statutory authority in the CWA for Montana to create such exemptions, it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2. *See also Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 851 (9th Cir.2002) (recognizing that the Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law").

We hold that Montana state law cannot exempt CBM water from being subject to the CWA when the Act does not provide the EPA or the State of Montana the authority to create such exemptions.

## IV

Because CBM water is a pollutant subject to regulation by the CWA and because Montana cannot create an exemption for CBM water that is otherwise subject to the CWA, we reverse the district court's grant of summary judgment to Fidelity and remand with instructions to enter summary judgment for NPRC.

**REVERSED and REMANDED.**

[SEAL]

**IN THE UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF MONTANA –
GREAT FALLS DIVISION

| | |
|---|---|
| NORTHERN PLAINS RESOURCE COUNCIL, INC.<br><br>Plaintiff,<br><br>v.<br><br>FIDELITY EXPLORATION & PRODUCTION CO., INC.<br><br>Defendant | **JUDGMENT IN A CIVIL CASE**<br><br>**CV-00-105-BLG-SEH**<br><br>(Filed Aug. 23, 2002) |

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__x__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to record made in open court August 23, 2002, plaintiff's motion for Summary Judgment on Counts I and II of the Amended Complaint is DENIED.

Defendant's motion for Summary Judgment for failure to establish violation of the Clean Water Act is GRANTED.

August 23, 2002 PATRICK DUFFY., CLERK

(date) /s/ Leslie Vaskey, Deputy Clerk

By: Leslie Vaskey, Deputy Clerk

FILED, ENTERED & NOTED IN CIVIL JUDGMENT BOOK

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**BILLINGS DIVISION**

| | |
|---|---|
| NORTHERN PLAINS RESOURCE COUNCIL, INC.,<br>Plaintiff,<br>vs.<br>FIDELITY EXPLORATION & PRODUCTION CO., INC.,<br>Defendant. | No. CV-00-105-BLG-SEH<br>**ORDER**<br>(Filed Aug. 23, 2002) |

Pursuant to the record made in open court on August 23, 2002,

ORDERED,

1. Plaintiff's Motion for Summary Judgment[1] on Counts I and II of the Amended Complaint is DENIED.

2. Defendant's Motion for Summary Judgment[2] for failure to establish violation of the Clean Water Act is GRANTED.

3. Defendant's Motion for Summary Judgment for failure to properly invoke jurisdiction is DENIED as moot.

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[1] Docket # 117.

[2] Docket # 111.

4. Plaintiff's Motion to Bifurcate Liability and Damages[3] is DENIED as moot.

DATED this 23rd day of August, 2002.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

[3] Docket #120.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NORTHERN PLAINS
RESOURCE COUNCIL,

Plaintiff,

-vs-

Civil Docket
No. 00-105-BLG-SEH

REDSTONE GAS PARTNERS,

Defendant.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
Heard in Courtroom No. 209
Federal Courthouse
215 First Avenue North
Great Falls, Montana
August 23, 2002
11 a.m.

BEFORE THE HONORABLE SAM E. HADDON
UNITED STATES DISTRICT JUDGE

TINA C. BRILZ, RPR, FCRR
Official Court Reporter
United States District Court
215 First Avenue North – P.O. Box 2186
Great Falls, Montana 59401-2186

Proceedings recorded by mechanical stenography, transcript produced by computer.

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* * *

[37] THE COURT: Yes.

Well, I do want to address this Sierra Club versus Cedar Point Oil case, because that case, as I said during the course of argument, is a case that the court has looked at with some substantial care.

And at first blush, it appeared to me that the Cedar [38] Point Oil case might be dispositive of the issues in this case. But upon further analysis of that case, it was my

conclusion that produced water, which is a defined term by regulation, in that case was not water that existed in the form in which it would have been said to have been present naturally before it was brought to the surface. The opinion of the Fifth Circuit recites, among other things, that during extraction, chemicals used in the drilling process become mixed with the water. And the definition of produced water as established by the Environmental Protection Agency describes produced water as water and particulate matter associated with oil and gas producing formations. Produced water includes small volumes of source water and treatment chemicals that return to the surface with the produced formation fluids, and so forth.

My conclusion is that produced water there is, as stated, a defined term. And it contains materials that were added in the production process. And I have concluded that what we have here is not the equivalent of produced water, because the water that we have in this case by all the record before the court is water in a natural state, without some sort of injection of materials by any production process.

I have concluded, as counsel have acknowledged, that there isn't any specific provision in the act that defines [39] this coal bed water as a pollutant. And if I am to find that coal bed water or the chemicals within it constitute a pollutant, I have to conclude that the act is to be read to allow the definitions of pollutant that are contained in the act to be expanded by regulation promulgated by the administrator pursuant to 33 United States Code Section 3161(a).

And that is the starting point of my analysis of this particular issue.

And I cannot – whether I personally would choose the language that Congress chose or not at any level, at any part of this statute, is beside the point. My personal views about the wisdom of this legislation, the manner in which it was written, the clarity of its language, or the lack of clarity, is irrelevant.

That's not my job. My job is not to second-guess the Congress. My job is to apply the law that Congress has written regardless of what I may personally think of it.

And my conclusion is that since pollutant is a defined term in the statute, and applying the rules of statutory construction that I have determined that I must follow, that I cannot, and in fact I do not read 3161(a) as giving to the secretary the authority to expand upon the definition of pollutants. Pollutant is a defined term. And what the statute has declared to be a pollutant is what this court [40] finds to be a pollutant.

And in reaching that conclusion, I have taken the statute as it's written. I've not added anything to it. And I've tried not to take anything away from the language chosen. There is a well-accepted rule of construction of statutes that the court is to apply the proposition that to define a particular term is to likewise limit its definition to that which is stated. And the United States Supreme Court has spoken on this subject, and I take guidance from what the court said there in the case of Colautti versus Franklin. Different set of circumstances. The case is reported at 439 United States 379.

But the proposition is clearly stated by the Supreme Court with cited reference: "A definition which declares what a term means, excludes any meaning that is not stated." And that's the rule I'm applying here.

And having made that application of that particular rule, I cannot reach the conclusion that the secretary had the authority to expand the definition.

And in looking at this whole picture, I've also looked at another section of the code which I found to provide some guidance on this whole issue, and that's another provision contained in Section 33-1362, subdivision 19 there.

I'll find that to quote it for you here in just a moment. And that's the provision that deals with the [41] definition of what is pollution. And the statute reads: "The term pollution means the man-made or man-induced alteration of a chemical, physical, biological, and radiological integrity of water."

The plain language of that statute requires, as I read it, that there be some man-made or man-induced alteration of one of these qualities, chemical, biological, or radiological integrity of the water, in order for there to be pollution of water.

And here the water is, by agreement of the parties, in an unaltered state. There's been no alteration of its chemical properties, which are what are the components that are in issue here, by any man-made or man-induced forces. And I conclude that there is no pollution, as defined in the statute, of this water.

And I conclude that natural, unaltered groundwater cannot be said to be polluted water, because it doesn't fit the definition of polluted water. And similarly, I cannot draw any conclusion that the addition of water that is by definition not polluted water can be said to cause pollution.

Now, I've looked at all of these cases and read them all, I believe. And after assessing their relative facts, it appears to me that the case that is most closely on point on this particular issue is this District Court case out of [42] the District of New York reported at 800 F. Supp. 1113, Bettis versus the Town of Ontario. And Judge Larimer in that case very succinctly stated what, in the view of this court, is an accurate definition of the statute: "The Clean Water Act makes unlawful the discharge of any pollutant by any person. Pollutants include solid waste, various other specified types of matter discharged into water. Water itself, however, is not a pollutant. And simply moving water from one place to another does not constitute the discharge of pollutant under the act."

So my conclusion on this issue is that unaltered groundwater is not a defined pollutant under the Clean Water Act. That it's not embraced with any of the other terms in 33 United States Code Section 1362(6). And it cannot be held to be a pollutant for purposes of the permit required by Section 33-1342.

But my analysis of this issue did not end at that point, because there is, in the view of the court, this very significant question of the interrelationship between federal program and state program.

And I want to address that issue, because it is a part of my basis for my ruling.

The program that exists in Montana is directly tied to the authorization to create such a program extended by the federal law as contained in Section 1362 subdivision (b).

[43] And the process that's spelled out in the statute is clear. There must be an application made consistent with the federal law. And there is a requirement, an affirmative requirement of approval of the state program by the feds before it can be implemented.

And there's no question but that the state program must meet the federal guidelines. That's spelled out in 1362(c) (2). And on this record that I have before me, there isn't any – there's no issue that the Montana program was approved. In order to have been approved, it had to meet the federal requirements. There's no issue that suggests that the Montana program has been revoked. And I read the federal statute to require very specifically that if there is to be a revocation of the state program, that affirmative action by the federal government is required to accomplish that task.

The federal regulations speak to this issue as well. And the record is clear, regardless of what action may be argued that the government should have taken to revoke Montana's program, it did not and has not revoked Montana's program.

And Mr. Tuholske, I have read with interest what the people who worked for the federal government said in letters written to the state. But it is a reality that no federal agent has any more authority than that which is given to him [44] by law. And the law, as I have read it in this case, absolutely requires if the state program is to be declared to be invalid, that the fed – federal program be implemented by taking affirmative action.

Now, whether the federal program should have undertaken affirmative action against the State of Montana is not the issue before me, and I can't make any assessment of that; and I offer no opinion on that.

But I do read the statute as requiring affirmative action to withdraw the permit, and that has not occurred.

Now, where does that leave us? Well, in my judgment, it leaves us with these given propositions that are applicable in this case.

The Clean Water Act establishes the standards that the state must follow; that the state can be approved for implementation of those standards and application of those standards to waters within its boundaries, only if it's approved by the EPA; that, in this case, such an approval was obtained; and on this record, it remains an approved program.

The state's program, if it is approved, in my judgment under the law, becomes the eyes, the ears, and the operative hands of the federal government.

And the Montana program, in my opinion, is in substance [45] an approved extension and operation of the federal program, and that it does not in this circumstance exist separately and apart as a stand-alone state-law-only program. It is an approved extension and operation of the federal program, and in substance, is one and the same as the federal program until such time as its approval is revoked.

And on this record, I conclude that the state program met the federal criteria and standards. And that the state – The EPA interpreted, and through the state as its

designated operative entity, approved the actions taken by the Montana Department of Environmental Quality in not requiring permits for the operations that discharged into the Tongue River.

And I have to give deference to the EPA's ultimate position regardless of statements made by persons working for that agency. I must look at the position it took. And the position it took was one of not contesting what Montana was doing by withdrawing the permit authority.

And I further find that if the EPA believed that the permit exemption that was accorded by the state agency to this CBM water was wrong, it had the affirmative obligation to undertake to withdraw the state's authority to act. And it did not do so.

And it also appears to me that this interpretation that existed is a further support for conclusion that CBM water [46] is not a pollutant under the act. And its discharge would not require a permit.

And even if it could be said that CBM water is a pollutant, and I want to make specifically clear that I do not so find, I find that its discharge in its unaltered form does not, under the federal law, that is, under the Clean Water Act as administered through the approved state program, require a permit.

And regardless of whether CBM water could be said to be a pollutant, its discharge without a permit was lawful under the state's approved 33 United States Code Section 1342 program; and consequently, discharges pursuant to that program were not in violation of 33 United States Code Section 1311. That is my ultimate conclusion on the issue.

If no permit is required, the fact that permits were obtained or the reasons for obtaining the permits, in my judgment, are irrelevant.

And given my conclusion and ruling on that core issue, it's not necessary that I reach or decide the defendant's standing issues or the jurisdictional issues, and I'm dismissing those motions as moot.

My conclusion and my ruling is that the defendant is entitled to summary judgment dismissing plaintiff's complaint as to Counts One and Two. And the motion to bifurcate liability and damages is denied as moot.

[47] Counsel, I want to make clear to all in this courtroom that this is a decision based upon my view of what the law requires this court to rule, given the law as written. It has within it and should be interpreted as having within it no editorial comment about the wisdom of any part of this program.

That's my ruling.

Counsel there will not be a written opinion on this matter. There will be a short order issued that will summarize the substantive rulings that the court has made based upon the record made here in open court.

Again, I want to thank you for your good work on both sides in bringing this matter to the court's attention in the fashion that you did and in the good work that was done on the briefing by all parties.

Thank you very much.

The Court is in recess.

(The proceedings in this matter were adjourned at 12:19 p.m)

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**SUPREME COURT OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, DC 20543-0001**

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 20, 2003

Mr. Jon Metropoulos
Gough, Shanahan, Johnson
PO Box 1715
Helena, MT 59624

Re: Fidelity Exploration and Production Company v. Northern Plains Resource Council, Inc. Application No. 02A1078

Dear Mr. Metropoulos:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on June 20, 2003, extended the time to and including August 8, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Clayton R. Higgins, Jr.

Clayton R. Higgins, Jr.
Assistant Clerk

NOTIFICATION LIST

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